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In the Supreme Court of the United States

OCTOBER TERM, 1927

Nos. 299 and 300

ARNOLD J. HELLMICH, COLLECTOR OF INTERNAL REVENUE, etc., Petitioner

v.

ISADORE N. HELLMAN

ARNOLD J. HELLMICH, COLLECTOR OF INTERNAL REVENUE, etc., Petitioner

v.

MILTON C. HELLMAN

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinions of the Circuit Court of Appeals for the Eighth Circuit (both cases, R. 21) are reported in 18 F. (2d) 239, 244. Those of the United States District Court for the Eastern District of Missouri (both cases, R. 10) were not reported.

JURISDICTION

The judgments of the Circuit Court of Appeals were entered March 18, 1927. (*Isadore N. Hellman case*, R. 28; *Milton C. Hellman case*, R. 21.) Petition for writs of certiorari was filed June 14, 1927, and granted October 17, 1927, under the provisions of Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The question in each of these cases is whether the gains resulting from the distribution of the assets of a dissolved corporation are subject both to normal tax and surtax under Section 201 of the Revenue Act of 1918 or are exempt from normal tax as a dividend within the meaning of Section 216(a) of that Act, because made out of profits accumulated since February 28, 1913, and therefore subject only to surtax.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Revenue Act of 1918 (c. 18, 40 Stat. 1057) are as follows (pp. 1059, 1062, 1069, 1143):

> SEC. 201. (a) That the term "dividend" when used in this title * * * means (1) any distribution made by a corporation, other than a personal service corporation, to its shareholders or members, whether in cash or in other property or in stock of the corporation, out of its earnings or profits accumulated since February 28, 1913 * * *.
>
> * * * * *

(c) A dividend paid in stock of the corporation shall be considered income to the amount of the earnings or profits distributed. Amounts distributed in the liquidation of a corporation shall be treated as payments in exchange for stock or shares, and any gain or profit realized thereby shall be taxed to the distributee as other gains or profits.

SEC. 210. That, in lieu of the taxes imposed by subdivision (a) of section 1 of the Revenue Act of 1916 and by section 1 of the Revenue Act of 1917, there shall be levied, collected, and paid for each taxable year upon the net income of every individual a normal tax at the following rates:

(a) For the calendar year 1918 * * *;

(b) For each calendar year thereafter, 8 per centum of the amount of the net income in excess of the credits provided in section 216: *Provided*, That in the case of a citizen or resident of the United States the rate upon the first $4,000 of such excess amount shall be 4 per centum.

SEC. 216. That for the purpose of the normal tax only there shall be allowed the following credits:

(a) The amount received as dividends from a corporation which is taxable under this title upon its net income, and amounts received as dividends from a personal service corporation out of earnings or profits upon which income tax has been imposed by Act of Congress * * *.

> SEC. 1309. That the Commissioner, with the approval of the Secretary, is hereby authorized to make all needful rules and regulations for the enforcement of the provisions of this Act.

Article 1548 of Treasury Regulations 45 (1919 edition), promulgated April 17, 1919, within two months after the date of the passage of the Revenue Act of 1918, provided:

> *Distribution in liquidation.* — So-called liquidation or dissolution dividends are not dividends within the meaning of the statute, and amounts so distributed, whether or not including any surplus earned since February 28, 1913, are to be regarded as payments for the stock of the dissolved corporation. Any excess so received over the cost of his stock to the stockholder, or over its fair market value as of March 1, 1913, if acquired prior thereto, is a taxable profit. A distribution in liquidation of the assets and business of a corporation, which is a return to the stockholder of the value of his stock upon a surrender of his interest in the corporation, is distinguishable from a dividend paid by a going corporation out of current earnings or accumulated surplus when declared by the directors in their discretion, which is in the nature of a recurrent return upon the stock.

This Article was amended in the 1920 edition of Treasury Regulations 45 by Treasury Decision 3206 (T. D., Int. Rev., Vol. 23, pp. 763, 769), to read as follows:

Distribution in liquidation.—So-called liquidation or dissolution dividends are not dividends within the meaning of the statute, and amounts so distributed, whether or not including any surplus earned since February 28, 1913, are to be regarded as payment for the stock of the dissolved corporation. Any excess so received over the cost of his stock to the stockholder constitutes income to such stockholder. However, if such stock was acquired prior to March 1, 1913, and the fair market value as of such date was greater than the cost but less than the amount so distributed, the taxable income is the excess over such fair market value of the amount received, but no gain is recognized if the amount received, although more than cost, is less than the fair market value of the stock on March 1, 1913. A distribution in liquidation of the assets and business of a corporation, which is a return to the stockholder of the value of his stock upon a surrender of his interest in the corporation, is distinguishable from a dividend paid by a going corporation out of current earnings or accumulated surplus when declared by the directors in their discretion, which is in the nature of a recurrent return upon the stock.

The regulation since then has remained unchanged and is still in effect so far as distributions in liquidation under the 1918 Act are concerned.

STATEMENT

Mutatis mutandis the facts in these two cases are the same. Each respondent on December 31, 1919,

owned one-half of the outstanding capital stock of Hellman & Sons Fur & Wool Company, a Missouri corporation. On that date the corporation voluntarily dissolved and liquidated its entire assets, which were distributed to its two stockholders in exchange for the stock held by them. At the time of liquidation the corporation had a net surplus of $46,466.27, of which amount $31,545.58 consisted of earnings and profits accumulated since February 28, 1913. By such liquidation each respondent realized a gain of $15,004.55 over and above the cost or March 1, 1913, value of the stock owned by him. (Both cases, R. 4–5.)

Neither respondent included in income taxes paid by him for the year 1919 any normal tax on said gain (both cases, R. 5–7), on the theory that it constituted a dividend within the meaning of Section 201 (a) of the Revenue Act of 1918, *supra*, which defines a dividend as "any distribution made by a corporation * * * out of its earnings or profits accumulated since February 28, 1913"; and that as such it is exempt from normal tax by Section 216(a), which provides that "the amount received as dividends from a corporation which is taxable * * * upon its net income" should be allowed as a credit for the purpose of the normal tax. (Both cases, R. 8–9.) Upon audit of respondents' returns, however, the Commissioner of Internal Revenue determined that the gain resulting from the distribution in liquidation of the assets of the corporation was subject to normal taxes under

Section 201(c) of the Revenue Act of 1918, *supra,* which provides that "amounts distributed in the liquidation of a corporation shall be treated as payments in exchange for stock or shares, and any gain or profit realized thereby shall be taxed to the distributee as other gains or profits." Accordingly, additional taxes were assessed against each respondent, paid under protest, and separate actions brought in the United States District Court for the Eastern District of Missouri for the recovery in each case of $1,200.35, with interest, said sum representing the amount of the additional taxes less certain overassessments. (Both cases, R. 7–9.)

The District Court gave judgment for the respondents. (*Isadore N. Hellman case,* R. 14; *Milton C. Hellman case,* R. 15.) Upon writs of error these judgments were affirmed by the Circuit Court of Appeals for the Eighth Circuit. (*Isadore N. Hellman case,* R. 28; *Milton C. Hellman case,* R. 21.)

ASSIGNMENT OF ERROR

The courts below erred in holding that under Section 201 of the Revenue Act of 1918, *supra,* the gain resulting from the distribution of the assets of a corporation in liquidation is not subject to the normal tax, and in holding that to the extent that such a liquidating distribution was made out of profits accumulated since February 28, 1913, it constituted a "dividend" exempt from normal tax.

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SUMMARY OF ARGUMENT

The decision of the Circuit Court of Appeals in the instant cases is in direct conflict with the decision of the Circuit Court of Appeals for the Sixth Circuit in *Langstaff* v. *Lucas,* 13 F. (2d) 1022; certiorari denied, 273 U. S. 721. The Government contends that the correct solution of the question presented is to be found in the *Langstaff case.* That decision not only accords with long-established and uniform administrative construction, but is also supported by the subsequent legislative history of the law. Double taxation is not involved, nor is there any greater hardship upon taxpayers than is necessarily incident to an income tax. Whatever doubt there might be as to the construction of the statute if the question were a new one should be resolved in favor of the Government, in view of the legislative history of Section 201 of the law and the fact that this is the first case in which its interpretation by the Treasury Department has been rejected during the period of nearly nine years which has elapsed since its enactment.

ARGUMENT

A DISTRIBUTION IN LIQUIDATION OF THE ASSETS OF A CORPORATION, WHETHER OR NOT ACCUMULATED SINCE FEBRUARY 28, 1913, IS NOT A DIVIDEND WITHIN THE MEANING OF THE REVENUE ACT OF 1918, AND, TO THE EXTENT OF THE RESULTING GAIN, IS SUBJECT TO THE NORMAL TAX

On the question here involved there is a direct conflict of opinion between the Circuit Court of

Appeals for the Eighth Circuit and the Circuit Court of Appeals for the Sixth Circuit. In the instant cases the Circuit Court of Appeals for the Eighth Circuit holds that under Section 201(a) of the Revenue Act of 1918, *supra,* that part of a liquidating distribution of the assets of a dissolved corporation which represents earnings since February 28, 1913, is a dividend and as such exempt from normal taxes under Section 216(a) of the same Act, *supra.* On the other hand, in *Langstaff* v. *Lucas,* 13 F. (2d) 1022, certiorari denied, 273 U. S. 721, which case was based upon facts similar to those in the cases at bar, presented the same question and involved the same sections of the Revenue Act of 1918, the Circuit Court of Appeals for the Sixth Circuit held that amounts distributed in the liquidation of a corporation are not dividends within the meaning of Section 201(a), but are to be treated under Section 201(c) as payments in exchange for stock and therefore subject to the normal tax. The latter case seems to present the better reasoning and accords with the unchallenged practice of the Government for nearly nine years.

The views of the Government can not be better expressed than by quoting the following language of the District Court in the *Langstaff case* (9 F. (2d) 691, 694):

> Loosely speaking, the distribution to the stockholders of a corporation's assets, upon liquidation, might be termed a dividend; but this is not what is generally meant and

understood by that word. As generally understood and used, a dividend is a return upon the stock of its stockholders, paid to them by a going corporation without reducing their stockholdings, leaving them in a position to enjoy future returns upon the same stock. Mr. Justice Pitney, in the case of *Lynch* v. *Hornby,* 247 U. S. 339, * * * in defining the word "dividend," as used in the act of 1913, which did not undertake to define the word, gives a good definition of the word as generally understood and used: "In short, the word 'dividends' was employed in the act as descriptive of one kind of gain to the individual stockholder; dividends being treated as the tangible and recurrent returns upon his stock, analogous to the interest and rent received upon other forms of invested capital." In other words, it is earnings paid to him by the corporation upon his invested capital therein, without wiping out his capital. On the other hand, when a solvent corporation dissolves and liquidates, it distributes to its stockholders, not only any earnings it may have on hand, but it also pays to them their invested capital, namely, the amount which they had paid in for their stock, thus wiping out their interest in the company. As heretofore suggested, the corporation in effect buys up and retires all of its outstanding stock.

An examination of section 201 of the act discloses that Congress had clearly in mind the distinction between a dividend, as generally understood, and a distribution in

liquidation, and intended to preserve this distinction. * * *

This section strips distributions made to stockholders in liquidation of a corporation of all disguises and declares that they shall be considered for what they in effect are—purchases of all their outstanding stock by the liquidating corporations, and not dividends as generally understood, and as defined in section 201, subsection (a), and as used in section 216. So construed, subsection (c) of section 201 puts the stockholder who holds his stock up to the time of liquidation, and then in effect sells it to the corporation, upon exactly the same footing as the stockholder who sells his stock to another during the operating life of the corporation. The latter unquestionably, under the act of 1918, was required to pay both the normal and surtax upon any profit realized by him in the transaction. That is all the former was required to do under the act as here construed.

For the reasons stated, the court is forced to the conclusion that it was not intended by Congress that so-called liquidating dividends, to the extent of the profit received, should escape the normal tax.

In affirming the above decision of the District Court, the Circuit Court of Appeals for the Sixth Circuit tersely says (13 F. (2d) 1022):

After considering carefully the reasons urged against it, we feel satisfied to affirm the judgment (9 F. (2d) 691), and we do so

> upon the reasoning and conclusions of the District Judge. Although the half interest in the corporate assets which came to Langstaff was within the broad definition of "dividend" in section 201 (a), * * * yet the transaction was the very one specifically provided for in the last sentence of section 201 (c), and the half interest became the proceeds of the sale of Langstaff's stock in the corporation, instead of a corporate dividend. Only so can the sections be effectively read together.
>
> Judgment affirmed.

Petition for certiorari in the *Langstaff case* was denied November 1, 1926 (273 U. S. 721).

The same position is also adopted by the Board of Tax Appeals in *Appeal of John K. Greenwood,* 1 B. T. A. 291; *Appeal of Clarence LeBus,* 1 B. T. A. 733; *Appeal of J. H. Morrow,* 1 B. T. A. 1148; *Appeal of S. B. Quigley,* 2 B. T. A. 159; *Appeal of W. C. Schroth,* 2 B. T. A. 169; *Appeal of Estate of Joseph Arnold,* 2 B. T. A. 759; and *Appeal of J. E. Chandler,* 3 B. T. A. 146.

The Circuit Court of Appeals in the instant cases states that the *Langstaff case, supra,* and the *Greenwood appeal, supra,* are authorities against the view taken by it, but says (*Isadore N. Hellman case,* R. 26) it is "unable to agree with these decisions." The principal points of disagreement on the part of the Circuit Court of Appeals are three in number.

First, the court holds that Section 201 (c) is not an exception or limitation upon 201 (a), but is supplementary thereto, and it adopts the language of the District Court where a field is suggested in which 201 (c) might operate without conflict with 201 (a), as follows (*Isadore N. Hellman case*, R. 25):

> "Gains might well accrue from the fact that the capital stock when acquired, at or before February 28th, 1913, might be worth less than par, and before liquidation such stock might have advanced to par, or more, in which case a gain or profit would accrue to the stockholder, which should be taxed as income and not as a dividend, and which therefore should bear not only a surtax in a proper case, but a normal tax also."

The court further suggests that the phrase "taxed to the distributee as other gains or profits" used in Section 201 (c) is broad enough to include dividends, and that in so far then as a gain or profit resulting from a liquidating distribution represents earnings accumulated since February 28, 1913, it should be taxed as any other dividend; that is, it should not be subject to the normal tax.

It is true that this is a possible interpretation of the law, but it is not the most natural interpretation, nor the one that Congress intended. The Revenue Act of 1921 omitted the provisions of Section 201(c) of the Revenue Act of 1918 with respect to distributions in liquidation, but the Revenue Act of

1924 reenacted in substantially the same language that section of the 1918 Act in so far as it related to distributions in complete liquidation. In the Report of the Committee on Ways and Means of the House of Representatives on the revenue bill of 1924 (Report No. 179, 68th Congress, 1st session, p. 11) it is said:

> Section 201(c): (1) The existing law [Revenue Act of 1921] has no provision similar to subdivision (c) of the bill, but the Treasury has construed the existing law as taxing liquidating dividends, not as capital gains, but as dividends subject to the surtax rates. The proposed bill, as did the 1918 act, treats a liquidating dividend as a sale of the stock to the corporation and recognizes the true effect of such a distribution. (Interpolation ours.)

Likewise in the Report of the Senate Committee on Finance on the revenue bill of 1924 (Report No. 398, 68th Congress, 1st session, p. 11) it is said:

> Section 201(c): (1) The existing law [Revenue Act of 1921] has no provision similar to subdivision (c) of the bill, but the Treasury has construed the existing law as taxing liquidating dividends, not as capital gains, but as dividends subject to the surtax rates. The bill treats a liquidating dividend as a sale of the stock, with the result that the gain to the taxpayer is treated not as a dividend subject only to the surtax but as a gain from the sale of property which may be treated as a capital gain. *The treatment of*

> ***liquidating dividends under the bill is substantially the same as provided for in the revenue act of 1918.*** A liquidating dividend is, in effect, a sale by the stockholder of his stock to the corporation; he surrenders his interest in the corporation and receives money in place thereof. Treating such a transaction as a sale and within the capital gain provisions is consistent with the entire theory of the act and, furthermore, is the only method of treating such distributions which can be easily administered. (Interpolation and italics ours.)

Again, in the Conference Report on the revenue bill of 1924 (House Report No. 844, 68th Congress, 1st session, p. 14) it is said:

> Amendment No. 2: The House bill provided that the gain from a liquidating dividend, to the extent of the earnings and profits accumulated by the corporation since March 1, 1913, should be treated as a dividend and subject to the surtax rates. The Senate amendment strikes out this provision with the result that a liquidating dividend is to be treated as a sale of stock and taxable as a gain from the sale of property; and the House recedes.

Since there is no express provision as to distributions in liquidation in the 1921 Act, there would seem to be no force to the court's argument that Congress sought in that Act to correct an erroneous interpretation by the Treasury Depart-

ment of the previous Act. As the 1921 Act is prospective the more reasonable assumption is that the omission simply indicates a change in legislative policy in that Act alone.

On the other hand, the use by Congress of substantially the same language with respect to distributions in complete liquidation in both the 1918 and the 1924 Acts, expressly indicating that it intended that language in the later Act to mean exactly what the Treasury regulations had already interpreted the earlier Act to mean, may reasonably be said to be a legislative approval of the Treasury Department's interpretation of the 1918 Act. If the attention of the court below had been called to this legislative history of the 1924 Act it might well have reached a different conclusion. The Act of 1924 was passed June 2, 1924. Up to that time there was no reported decision of the courts in which the construction by the Treasury Department of the 1918 Act had been even questioned. It is also not without significance that in the 1924 Act Congress expressly rejected a proposal to treat such distributions in complete liquidation as dividends. The provisions of the 1926 Act respecting complete liquidations are substantially the same as the 1924 Act. (Act of February 26, 1926, c. 27, Sec. 201(c), 44 Stat. 9, 11; U. S. C. App., Title 26, Sec. 932.

Second, it is objected by the Circuit Court of Appeals that under the contention of the Government (*Isadore N. Hellman case,* R. 27)—

> if distribution of the surplus accumulated since February 28, 1913, had been made in the form of a dividend declared by the corporation the day before it was intended to liquidate and dissolve the same, it would have been a dividend and not subject to the normal tax; if distributed the next day in a final liquidation of the corporation it would be subject to the normal tax. The manner of distribution, if this position is correct, determines taxability, and not the character of the income.

This objection does not carry conviction. The fact is that in the cases at bar the amounts distributed were not distributed as ordinary dividends. The fact that they might have been so distributed is not material. The possibility of occasional instances of apparent hardship in the incidence of the tax may be conceded, but that can not affect the tax liability of respondents. It is well known that there is a wide variety of cases in which tax liability varies according to the form which the transaction actually takes. For a discussion upon this topic see Magill's "Notes on the Revenue Act of 1924" (24 Columbia Law Review, p. 836, at p. 844 et seq.).

Third, the court holds that the construction contended for by the Government and sustained in the *Langstaff case* "results in a double income tax, as these earnings of the corporation have already been fully taxed." (*Isadore N. Hellman case,* R. 27.)

This objection also fails to carry conviction. The result of taxing a distribution in liquidation as a

sale by the stockholder of his shares to the corporation is exactly the same as that which would follow a sale of the stock to a third party. If the stockholders in these cases had sold their stock prior to dissolution of the corporation, their tax liability would admittedly be determined in the same manner as here contended for and any gain over the cost or March 1, 1913, value would have been subject both to normal tax and surtax regardless of the extent to which the sale price reflected surplus upon which the corporation had already paid normal tax. This Court has sustained the tax on the sale of stock under such circumstances without any suggestion that it amounted to double taxation. See *Merchants' Loan & Trust Company* v. *Smietanka,* 255 U. S. 509; *Goodrich* v. *Edwards,* 255 U. S. 527, and similar cases. However, even if the interpretation of Section 201(c) did amount to double taxation—and the Government contends that it does not—effect should still be given to the provision. Double taxation is to be avoided if possible (*Tennessee* v. *Whitworth,* 117 U. S. 129), but there is no constitutional or legal objection to it (*Cream of Wheat Company* v. *County of Grand Forks, North Dakota,* 253 U. S. 325); and where Congress has clearly expressed its intention, as it has here, or where double taxation naturally and unavoidably results from the language of the law, the courts will sustain it. *Patton* v. *Brady,* 184 U. S. 608; *Porto Rico Coal Company* v. *Edwards,* 275 Fed. 104; *Ketterer* v. *Lederer,* 269 Fed. 153; *United States* v. *J.*

D. Iler Brewing Company, 121 Fed. 41; and *Westfall* v. *Shook,* 29 Fed. Cas. No. 17448.

Finally, the court says (*Isadore N. Hellman case,* R. 26):

> The question involved in this case is not easy of solution. It may fairly be considered a close one, and not free from doubt. Plausible argument can be presented for the position taken by either side to the controversy as to the construction of subdivisions (a) and (c) of section 201.

And then the court proceeded to apply the rule that doubts are to be resolved in favor of the taxpayer. Aside from the fact that the legislative history of the law seems to remove all possibility of doubt, the action of the court in applying the rule as to doubts overlooks another important rule of construction which deserves consideration in the decision of the case at bar, and that is the effect of long-continued administrative construction. Article 1548 of Treasury Regulations 45 has been in effect since April 17, 1919—nearly nine years. It has been uniformly applied by the Commissioner of Internal Revenue to all cases arising during that period. It has been consistently sustained by the Board of Tax Appeals in the numerous cases above cited. The provision of law upon which the regulation is based has been reenacted by Congress as Section 201 (c) in both the Revenue Acts of 1924 and 1926 without substantial change and with knowledge of the interpretation previously placed

upon it by the Commissioner. This is the first instance in which the position of the Commissioner has been rejected by a court. Under these circumstances it is submitted that this is certainly a most appropriate case in which to follow an administrative construction, whatever doubt there might be as to the meaning of the law if the question were a new one. *National Lead Company* v. *United States,* 252 U. S. 140; *Maryland Casualty Company* v. *United States,* 251 U. S. 342; *Heiner* v. *The Colonial Trust Company, etc.,* Nos. 219 and 220, October Term, 1927, this Court, decided November 21, 1927.

Overturning long-continued administrative construction of the Revenue Acts is especially to be deplored. It results in administrative confusion and in discrimination between taxpayers whose cases have been finally closed and those whose cases are still open.

CONCLUSION

In view of the foregoing, it is respectfully submitted that the judgments of the Circuit Court of Appeals in the cases at bar should be reversed.

WILLIAM D. MITCHELL,
Solicitor General.
MABEL WALKER WILLEBRANDT,
Assistant Attorney General.
SEWALL KEY,
Attorney.

DECEMBER, 1927.

○

Supreme Court, U. S.
FILED
DEC 27 1927
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1927.

ARNOLD J. HELLMICH, Collector of Internal Revenue, etc., Petitioner,
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No. 299.

ARNOLD J. HELLMICH, Collector of Internal Revenue, etc., Petitioner,
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MILTON C. HELLMAN, Respondent.
No. 300.

On Writs of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF FOR RESPONDENTS.

HENRY N. FURTH,
Attorney for Respondents.

Rule Printing & Law Publishing Co., 115 North Dearborn Street, Chicago 6477.

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Holmes, Federal Taxes (1925 ed.), p. 830..... 13

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1927.

ARNOLD J. HELLMICH, Collector of Internal Revenue, etc., Petitioner, vs. ISADORE N. HELLMAN, Respondent.	No. 299.
ARNOLD J. HELLMICH, Collector of Internal Revenue, etc., Petitioner. vs. MILTON C. HELLMAN, Respondent.	No. 300.

On Writs of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF FOR RESPONDENTS.

STATEMENT OF PETITIONER'S CLAIMS.

Petitioner does not assail the reasoning of the Circuit Court of Appeals, but asks for a reversal of these judgments chiefly on two grounds: First, the alleged legisla-

tive history of Section 201 (c) of the Revenue Act of 1918, and, second, that the interpretation of a statute by the executive department charged with its execution is entitled to great weight.

SUMMARY OF RESPONDENTS' ANSWER TO PETITIONER'S CLAIMS.

Respondents do not deny that in ascertaining the meaning of a statute resort may be had, in a proper case, to the legislative history of the act as well as to the construction given to it by the executive department. But these are mere rules of construction, surely of no higher rank than the many other rules of construction, and subordinate, perhaps, to a great many of them. The general principle is that the statute itself furnishes the best means for its own exposition, and if the sense in which words were intended to be used can be clearly ascertained from all its parts and provisions, a resort to extrinsic facts is not permitted to ascertain their meaning.

> Thomas v. Vandegrift, 162 Fed. Rep. 645, 89 C. C. A. 437.

Applying that principle to the case in hand, it is respondents' contention that neither of the rules invoked by petitioner is applicable, because the sense of the statute can be readily ascertained from its language by the application of the elementary rules of statutory construc-

tion. We shall, however, briefly notice petitioner's contention based on these rules.

LEGISLATIVE HISTORY OF THE ACT.

Petitioner sets out in his brief what he calls a legislative history of the act, but an examination of the matter offered reveals that it consists of excerpts from congressional reports made to the Sixty-eighth Congress with reference to the Revenue Act of 1924, C. 234, 43 Stat. 253, 255, Sec. 201 (c), and a brief reference to the Revenue Act of 1926, C. 27, 44 Stat. 911, Section 201 (c).

The Revenue Act of 1924 was enacted five years after the passage of the Revenue Act of 1918, and the Revenue Act of 1926 was passed almost seven years after the Revenue Act of 1918. The Revenue Act of 1918 was enacted by the Sixty-fifth Congress. The Revenue Acts of 1924 and 1926 were enacted by the Sixty-eighth and Sixty-ninth Congresses, respectively. The reports mentioned in petitioner's brief were made to the Sixty-eighth Congress with reference to the then pending Revenue Act of 1924, and contain a few words on the part of the committee expressing its opinion of the intention of the Sixty-fifth Congress in enacting Section 201 (c) of the Revenue Act of 1918. It requires no argument to demonstrate that this is no legislative history of the Revenue Act of 1918, but a mere expression of opinion of members of a subsequent Legislature upon the meaning of a statute previously enacted. Such expressions of opinion have no

legal force whatsoever. If they could, by any stretch of the imagination, be termed a legislative construction of an act, they would still be without force, because they do not constitute a "contemporaneous" construction. They do not represent an expression of the Congress that enacted the law. As the Supreme Court of Minnesota aptly said of such a document:

> "The opinion of subsequent legislators upon the meaning of a statute is entitled to no more weight than that of the same men in a private capacity."
>
> Bingham v. Winona County, 8 Minn. 441, 448, 449.

With reference to the claims in petitioner's brief that the Revenue Acts of 1924 and 1926 contain substantially the same provisions as the Act of 1918 and may, therefore, be considered a legislative approval of the construction put upon section 201 (c) by the Treasury Department, we call attention to the fact that the Revenue Act of 1921, enacted by the Sixty-sixth Congress, contained no provision whatever similar to that of Section 201 (c) of the Revenue Act of 1918. So that Section 201 (c) of the Revenue Acts of 1924 and 1926 does not merely continue Section 201 (c) of the Act of 1918, but is an entirely new act on the subject. It should also be noted that Section 201 (c) of the Revenue Acts of 1924 and 1926 differs radically from Section 201 (c) of the Revenue Act

of 1918, in that both of the later acts omit from their section 201 (c) the concluding words of Section 201 (c) of the Act of 1918, to wit:

> "Any gain or profit realized thereby shall be taxed to the distributee as other gains or profits."

The importance of this clause was recognized by the Circuit Court of Appeals, which said that it alone was sufficient warrant for the exemption of the distribution in this case from the normal tax (R. p. 25).

RULE OF DEPARTMENTAL CONSTRUCTION.

That the practical construction given to an act of Congress, fairly susceptible of different constructions, by one of the executive departments of the Government is entitled to respect is, as stated, a mere rule of construction, one among a number of rules to be applied in proper cases. It is not absolute, nor does it preclude inquiry by the courts as to the original correctness of such construction. If the meaning of the statute can be clearly ascertained from all its parts and provisions a resort to extrinsic facts is not permitted to ascertain the meaning. And if, when tested by the rules of statutory construction, the departmental construction of the act is erroneous, the courts will not hesitate to reject the departmental construction, however long it may have continued.

Houghton v. Payne, 194 U. S. 88, 99, 100;
Webster v. Luther, 163 U. S. 331, 342;
U. S. v. Johnston, 124 U. S. 236, 253;
U. S. v. Graham, 110 U. S. 219, 221.

And if the departmental construction were obviously or clearly wrong, it would be the duty of the Court to so adjudge.

U. S. v. Finnell, 185 U. S. 236, 244;
U. S. v. Tanner, 147 U. S. 661, 663.

The fact that the Commissioner of Internal Revenue may have construed a statute does not oust the courts of their jurisdiction as the ultimate expositors of the law. If that were the case, the Commissioner of Internal Revenue, undertaking to interpret statutes by formulating regulations in advance of the actual event, could usurp the functions of the courts and draw to himself judicial powers. Such is not the law. It is for the courts to construe a statute, and not the executive departments of the Government, and where the Court is satisfied that the statute requires a different construction than that adopted by the department, a Treasury regulation rises to no higher dignity than an expression of opinion.

Ex parte Mikell, 253 Fed. Rep. 817, 820;
U. S. ex rel. Simonian v. Tod, Commissioner, 297 Fed. Rep. 172, 174;
Douglas v. Edwards, 298 Fed. Rep. 229, 245.

We, therefore, submit that the rule that regulations of the Treasury Department made in the construction of the statute are entitled to respect ranks no higher than the other rules of construction, and is distinctly inferior in rank to those rules which require that the meaning of a statute is to be ascertained whenever possible from the language of the act itself, without resorting to extrinsic matters.

The plea that an affirmance of these judgments and the overturning of the departmental construction of the Act of 1918 would result in discrimination between taxpayers because some of them have been compelled to pay taxes under the erroneous construction and others would escape when that error was corrected, is, to say the least, somewhat peculiar. It amounts to the plea that because injustice has been done to some in the past it must continue to be done to everybody for the sake of justice. The mere statement of the argument is its own refutation.

ARGUMENT AGAINST THE COMMISSIONER'S CONSTRUCTION OF SECTION 201 (c) OF THE REVENUE ACT OF 1918.

The distribution in question having clearly been made out of earnings or profits accumulated by the corporation since February 28, 1913, is a dividend under Section 201 (a) of the Revenue Act of 1918 and exempt from normal tax under Section 216 (a) of that act unless it is deprived of its status as a dividend by virtue of Section 201 (c) of the Revenue Act of 1918. The Commissioner of Internal Revenue has construed Section 201 (c) as a declaration that such a distribution is not a dividend within the meaning of the Revenue Act of 1918. That construction is clearly erroneous for the following reasons:

1. It has the effect of imposing a tax of 8 per cent upon the respondents by mere construction. Under Section 201 (a) of the Revenue Act of 1918 this distribution is clearly a dividend. If Congress had intended by Section 201 (c) to declare that such distribution is not a dividend when made in the liquidation of a corporation, it would have been easy to say so. Congress did not so provide by any express language, and, in the absence of specific language to that effect, no such intention is presumed.

Shwab v. Doyle, 258 U. S. 529, 536.

This Court has repeatedly held that before any tax can be imposed on a citizen the Legislature must so declare by clear and unambiguous words. Section 201 (c) of the Act of 1918 contains no language imposing any tax. Hence, no tax can be predicated upon it.

> Eidman v. Martinez, 184 U. S. 578, 583;
> U. S. v. Isham, 17 Wall. (84 U. S.) 496, 504;
> Spreckels Sugar Refining Co. v. McClain, 192 U. S. 397, 416.

2. It extends the provisions of the Revenue Act by implication beyond the clear import of the language used. The Commissioner takes the provision in section 201 (c) that "amounts distributed in the liquidation of a corporation shall be treated as payments in exchange for stock or shares" as an expression by Congress that gains realized in the course of liquidation by a corporation shall be subject to both normal and surtax, although it contains no express language to that effect.

Dismissing for the present the question of the effect of the clause following immediately thereafter, which directs how such gains shall be taxed, we answer this contention by saying that if Congress intended to impose both normal tax and surtax on accumulated earnings when distributed by a corporation in liquidation, the statute does not so state in clear and unambiguous language. Being a taxing act, its language cannot be stretched or its provisions extended by implication to

accomplish a supposed intention on the part of the lawmaker. The intention of the lawmaker is to be gathered from the words of the statute, and assuming, though not admitting, that Congress may have had the intention of subjecting profits so distributed to both normal tax and surtax, a mere intention to tax would not be sufficient in the absence of appropriate language imposing the tax. A statute dealing with taxation is strictly construed against the sovereign and in favor of the taxpayer.

U. S. v. Wigglesworth, Fed. Cas. 16, 690;
2 Story 369;
Gould v. Gould, 245 U. S. 151, 153;
Rice v. U. S., 53 Fed. Rep. 910, 911, 912;
U. S. v. Merriam, 263 U. S. 179, 188;
Haiku Sugar Co. v. Johnston, 249 Fed. Rep. 103.

3. If the meaning of the statute is doubtful, the Commissioner's construction of the statute in favor of the Government violates the rule that doubts in a taxing act are to be resolved in favor of the taxpayer.

Powers v. Barney, 5 Blatch. 202, 203;
Hartranft v. Wiegmann, 121 U. S. 609, 616;
American Net etc. Co. v. Worthington, 141 U. S. 468, 474;
Benziger v. United States, 192 U. S. 38, 55.

4. It imposes double taxation without express words in the statute to that effect.

We do not contend that double taxation is necessarily unconstitutional, but we deny that Congress has imposed double taxation in this case. Petitioner has pointed out no provision of the Revenue Law of 1918 which expressly imposes double taxation on these distributions, and it is a well-established rule that the intent to impose double taxation is never presumed. Whenever a citizen is to be subjected to a double liability the language of the statute must make that intention clear.

> Malley v. Hecht, 265 U. S. 144, 159;
> Tennessee v. Whitworth, 117 U. S. 129, 137.

Petitioner cites as an example of double taxation the subjection of gains on sales of stock to both normal and surtax, and ascribes it to the theory that the seller is really being doubly taxed on his dividends. "This example does not carry conviction." One who sells his stock in a going corporation and receives the enhancement represented by its earnings is really selling his right to receive the dividends when they are declared exempt from the normal tax, and the man who buys the stock receives the dividend when declared free from the normal tax. In that case the seller is simply anticipating his dividends and pays a tax for the privilege. But he nevertheless makes a sale, and the profit he receives is as much a gain as though he had sold merchandise at a profit. The buyer of the stock acquires the exemption from normal tax. One who participates in the liquida-

tion of a corporation surrenders his stock to the corporation and receives his proportionate share of the assets of the corporation. He sells no right to receive dividends tax free, as is the case in an ordinary sale of stock, but retains it in its entirety. There is no real analogy between a sale of stock in a going concern and the complete liquidation of a corporation. They are two entirely different things, and there is no internal evidence in the statute that the Sixty-fifth Congress attempted to assimilate them.

5. The Commissioner's construction of the statute is erroneous because it ignores the concluding provision of Section 201 (c) that "any gain or profit realized thereby shall be taxed to the distributee **as other gains or profits,**" and treats it as though it read that any such gain or profit shall be taxed to the distributee **as a gain on a sale of property.**

The gain realized by the respondents in the liquidation of their corporation was within the broad definition of a dividend in Section 201 (a) of the Act of 1918, and would have been exempt from normal tax if made by a going concern. It was subjected to both normal and surtax for the sole reason that it resulted from a distribution made in the liquidation of a corporation. This, respondents contend, is in direct violation of the mandate of the statute, which requires that such gains shall be taxed to the distributee as **other gains or profits.**

LANGSTAFF v. LUCAS, 9 FED. REP. (2d) 691, 694, AFFIRMED 13 FED. REP. (2d) 1022.

Petitioner relies on this case, which supports the Government's views. The Circuit Court of Appeals in the instant cases, however, found itself unable to agree with that decision and decisions of the Board of Tax Appeals to the same effect cited in the Government's brief. The Circuit Court of Appeals in its opinion remarked that the Langstaff case was evidently based on Lynch v. Hornby, 247 U. S. 339, and the companion case of Lynch v. Turrish, 247 U. S. 221, and that Article 1548, Regulations 45, is also very evidently based on the same case (R. pp. 24, 25). It is pointed out that these two cases were decided under the Revenue Act of October 3, 1913, **which contains no definition of the term "dividend,"** and that the question in both cases, as pointed out in Holmes Federal Taxes (1923 Edition, p. 625, and 1925 Edition, p. 830), was whether a distribution of earnings accumulated prior to March 1, 1913, should be considered as dividends (R. p. 27). The status of earnings or profits accumulated subsequent to March 1, 1913, was not considered, and the cases are no authortiy for the proposition that a distribution by a corporation in liquidation out of its earnings accumulated since February 28, 1913, is not a dividend under Section 201 (c) of the Revenue Act of 1918.

But apart from those considerations, the fact is that the statute under which Lynch v. Hornby was decided

did not define the term "dividend," whereas the statute under which Langstaff v. Lucas arose contained a very complete and specific definition of the term.

In Lynch v. Hornby, the Court was justified in assuming that the term "dividend" in the Act of October 3, 1913, was used in the sense in which it was generally understood, and the Court was, therefore, at liberty to say what Congress intended to include under the word "dividend," but in the Langstaff case there was no such situation. Congress defined the word "dividend" and the Court was not at liberty to substitute its own definition for that given in the act. Nevertheless, the Court in he Langstaff case took as the basis of its decision the definition of the term "dividend" given by Mr. Justice Pitney in Lynch v. Hornby instead of the definition given by Congress in Section 201 (a) of the Revenue Act of 1918. It also overlooked or ignored the provision in Section 201 (c) of the Revenue Act of 1918 that gains or profits realized in a liquidation shall be taxed to the distributee **as other gains or profits.** If that clause means anything at all, it forbids distinctions in the taxation of distributions out of corporate earnings accumulated since February 28, 1913. It requires that all distributions of earnings accumulated since that date shall be taxed alike. That requirement was not present in the Act of October 3, 1913. Under the Revenue Act of 1918 it is the character of the income out of which the distri-

bution is made, and not the manner of distribution, that determines its status as a dividend vel non.

CONCLUSION.

Petitioner's grounds for reversal are substantially two in number, viz.: That the legislative history of the act shows that the Commissioner's interpretation of Section 201 (c) of the Act of 1918 accords with the intention of Congress, and that long-continued administrative construction of the act entitles it to special consideration at the hands of the Court.

The so-called legislative history of the act proves, on examination, to be a mere expression of private opinion on the part of the members of a subsequent Congress five years after the enactment of the statute. And the long-continued administrative construction of the act is merely a rule of construction not binding on the courts, and never so when the departmental construction is erroneous. The opinions of the courts and the authorities cited show clearly that the administrative construction of the act by the Treasury Department is erroneous in that it violates a number of the elementary rules of statutory construction which have ever been regarded as of vital importance to the liberty of the citizen. It is likewise evident that the case of Langstaff v. Lucas and the decisions of the Board of Tax Appeals to the same effect are likewise erroneous, being based upon the same miscon-

struction of the statute, and should, therefore, not be approved.

Wherefore, we respectfully submit that the judgments of the Circuit Court of Appeals in these cases should be affirmed.

Respectfully submitted,

HENRY H. FURTH,
Attorney for Respondents.